

APPENDIX A - Commenters and Reply CommentersAppendix A, Part 1: List of Commenters

<u>Comment Filer's Name</u>	<u>Abbreviation</u>
218-219 MHz Licensees	218-219 Group
AirTouch Paging	AirTouch
Bay Area 218-219 MHz Group	Bay Area
Boston Spectrum Associates, LLC, and Houston Spectrum Associates, LLC	Boston/Houston
Concepts to Operations, Inc. (Stanley Cohn)	Concepts
Commercial Realty St. Pete, Inc.	CRSPI
Community Teleplay, Inc.	Community
Dispatch Interactive Television Company	Dispatch
EON Corporation	EON
Hughes, Kingdon R.	Hughes
In-Sync Interactive Corporation	In-Sync
Interactive Services Trade Association	ISTA
ITV, Inc. and IVDS Affiliates, LLC	ITV
IVDS Enterprises Joint Venture	IVDS Enterprises
IVDS/RLV, L.L.C. and Friends of IVDS, Inc.	IVDS/RLV
MKS Interactive, Inc.	MKS
Petty, Gary L.	Petty
Radio Telecom & Technology Inc.	RTT
Rand McNally & Company	Rand McNally
Two Way TV, Inc.	Two Way

Appendix A, Part 2: List of Reply Commenters

<u>Reply Comment Filer's Name</u>	<u>Abbreviation</u>
218-219 MHz Licensees	218-219 Group
Boston Spectrum Associates, LLC, and Houston Spectrum Associates, LLC	Boston/Houston
Commercial Realty St. Pete, Inc.	CRSPI
Community Teleplay, Inc.	Community
Concepts to Operations, Inc.	Concepts
Dispatch Interactive Television Company	Dispatch
Eagle Interactive Partner, Inc.	Eagle
EON Corporation	EON
Hispania & Associates, Inc. (Alejandro Calderon)	Hispania
Hughes, Kingdon R.	Hughes
In-Sync Interactive Corporation	In-Sync
Interactive Innovations, Inc.	Interactive
Interactive Video Data Service Trade Association	ISTA
IVDS Coalition	Coalition

Phoenix Data Communication, Inc.
Two Way TV, Inc.

Phoenix
Two Way

APPENDIX B - FINAL RULES

Parts 1, 20 and 95 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. PART 1 — PRACTICE AND PROCEDURE

1. Section 1.2105 is amended to revise paragraph (a)(2)(xi) is to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) * * *

(2) * * *

(xi) For C block and 218-219 MHz Service applicants, an attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency.

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B. PART 20 — COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 is revised to read as follows:

AUTHORITY: Secs. 4, 251, 252, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251, 252, 303, and 332, unless otherwise noted.

2. Section 20.9 is amended by redesignating paragraph (a)(12) as (a)(13), redesignating (a)(13) as (a)(14), and inserting a new paragraph (a)(12) as follows:

§ 20.9 Commercial mobile radio services.

(a) * * *

(12) Mobile operations in the 218-219 MHz Service (part 95, subpart F of this chapter) that provide for-profit interconnected service to the public;

* * * * *

C. PART 95 — PERSONAL RADIO SERVICES

1. The authority citation for Part 95 is revised to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 95.1 is amended to revise paragraph (b) to read as follows:

GENERAL PROVISIONS**§ 95.1 The General Mobile Radio Service (GMRS).**

(a) * * *

(b) The 218-219 MHz Service is a two-way radio service authorized for system licensees to provide communication service to subscribers in a specific service area. The rules for this service are contained in subpart F of this part.

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3. Section 95.801 is amended to read as follows:

Subpart F - 218-219 MHz Service**GENERAL PROVISIONS****§ 95.801 Scope.**

This subpart sets out the regulations governing the licensing and operation of a 218-219 MHz system. This subpart supplements Part 1, Subpart F of this chapter, which establishes the requirements and conditions under which commercial and private radio stations may be licensed and used in the Wireless Telecommunications Services. The provisions of this subpart contain additional pertinent information for current and prospective licensees specific to the services governed by this Part 95.

4. Section 95.803 is amended to read as follows:

§ 95.803 218-219 MHz Service description.

(a) The 218-219 MHz Service is a two-way radio service authorized for system licensees to provide communication service to subscribers in a specific service area.

(b) The components of each 218-219 MHz Service system are its administrative apparatus, its response transmitter units (RTUs), and one or more cell transmitter stations (CTSs). RTUs may be used in any location within the service area

5. Section 95.805 is amended to read as follows:

§ 95.805 Permissible communications.

A 218-219 MHz Service system may provide any fixed or mobile communications service to subscribers within its service area on its assigned spectrum, consistent with the Commission's rules and the regulatory status of the system to provide services on a common carrier or private basis.

6. Section 95.807 is added to read as follows:

§ 95.807 Requesting regulatory status.

(a) Authorizations for systems in the 218-219 MHz Service will be granted to provide services on a common carrier basis or a private basis, or on both a common carrier and private basis in a single authorization.

(1) Initial applications. An applicant will specify on FCC Form 601 if it is requesting authorization to provide services on a common carrier basis, a private basis, or on both a common carrier and private basis.

(2) Amendment of pending applications. Any pending application may be amended to: (i) change the carrier status requested; or (ii) add to the pending request in order to obtain both common carrier and private status in a single license.

(3) Modification of license. A licensee may modify a license to: (i) change the carrier status authorized; or (ii) add to the status authorized in order to obtain both common carrier and private status in a single license. Applications to change, or add to, carrier status in a license must be submitted on FCC Form 601 in accordance with Section 1.1102 of this chapter.

(4) Pre-existing licenses. Licenses issued before [effective date of rules] are authorized to provide services on a private basis. Licensees may modify this initial status pursuant to Paragraph (a)(3) of this Section.

(b) An applicant or licensee may submit a petition at any time requesting clarification of the regulatory status required to provide a specific communications service.

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7. Section 95.811 is revised to modify paragraphs (b), (c), and (d) to read as follows:

SYSTEM LICENSE REQUIREMENTS

§ 95.811 License requirements.

(a) * * *

(b) A CTS must be individually licensed to the 218-219 MHz Service licensee for the service area in which the CTS is located in accordance with Part 1, Subpart F of this chapter if it:

(1) is in the vicinity of certain receiving locations (see § 1.924 of this chapter);

(2) may have significant environmental effect (see part 1, subpart I of this chapter);

(3) is part of an antenna structure that requires notification to the Federal Aviation Administration (see part 17, subpart B of this chapter); or

(4) has an antenna the tip of which exceeds:

(i) 6.1 meters (20 feet) above ground level; or

(ii) 6.1 meters (20 feet) above the top of an existing man-made structure (other than an antenna structure) on which it is mounted.

(c) All CTSs not meeting the licensing criteria under paragraph (b) of this Section are authorized under the 218-219 MHz Service system license.

(d) Each component RTU in a 218-219 MHz Service system is authorized under the system license or if associated with an individually licensed CTS, under that CTS license.

8. Section 95.812 is added to read as follows:

§ 95.812 License term.

(a) The term of each 218-219 MHz Service system license is ten years from the date of original issuance or renewal.

(b) Licenses for individually licensed CTSs will be issued for a period running concurrently with the license of the associated 218-219 MHz Service system with which it is licensed.

9. Section 95.813 is revised to modify paragraph (b) and to remove paragraph (c) to read as follows:

§ 95.813 License eligibility.

(a) * * *

(b) An entity that loses its 218-219 MHz Service authorization due to failure to meet the construction requirements specified in § 95.833 of this part may not apply for a 218-219 MHz Service system license for three years from the date the Commission takes final action affirming that the 218-219 MHz Service license has been canceled.

10. Section 95.815 is revised to modify paragraph (a) and (b) to read as follows:

§ 95.815 License application.

(a) In addition to the requirements of part 1, subpart F of this chapter, each application for a 218-219 MHz Service system license must include a plan analyzing the co- and adjacent channel interference potential of the proposed system, identifying methods being used to minimize this interference, and showing how the proposed system will meet the service requirements set forth in § 95.831 of this part. This plan must be updated to reflect changes to the 218-219 MHz Service system design or construction.

(b) In addition to the requirements of part 1, subpart F of this chapter, each request by a 218-219 MHz Service system licensee to add, delete, or modify technical information of an individually licensed CTS (*see* § 95.811 (b) of this part) * * *

11. Section 95.816 is revised to read as follows:

§ 95.816 Competitive bidding proceedings.

(a) Mutually exclusive initial applications for 218-219 MHz Service system licenses are subject to competitive bidding procedures. The procedures set forth in Part 1, Subpart Q of this chapter will apply unless otherwise provided in this part.

(b) *Installment payments.* Eligible Licensees that elect resumption pursuant to Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239 (released September 10, 1999) may continue to participate in the installment payment program. Eligible Licensees are those that were current in installment payments (*i.e.* less than ninety days delinquent) as of March 16, 1998, or those that had properly filed grace period requests under the former installment payment rules. All unpaid interest from grant date through election date will be capitalized into the principal as of Election Day creating a new principal amount. Installment payments must be made on a quarterly basis. Installment payments will be calculated based on new principal amount as of Election Day and will fully amortize over the remaining term of the license. The interest rate will equal the rate for five-year U.S. Treasury obligations at the time of licensing.

(c) *Eligibility for small business provisions.*

(1) A small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed \$15 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed \$3 million for the preceding three years.

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraph (b)(1) or (b)(2) of this section, the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

(4) Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(5) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (b)(1) of this section (or each of which individually satisfies the definition in paragraph (b)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

(d) *Controlling interest.*

(1) For purposes of this section, controlling interests includes individuals or entities with *de jure* and *de facto* control of the applicant. *De jure* control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(2) *Calculation of certain interests.*

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person, or its affiliate pursuant to § 1.2110(b)(4) of this chapter, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

- (i) The nature or types of services offered by such an applicant or licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

- (i) The nature or types of services offered by such an applicant or licensee;
- (ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(f) *Bidding credits.* A winning bidder that qualifies as a small business or a consortium of small businesses as defined in this subsection may use the bidding credit specified in § 1.2110(e)(2)(ii) of this chapter. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in this subsection may use the bidding credit specified in accordance to § 1.2110(e)(2)(i) of this chapter.

(g) Winning bidders in Auction No. 1, which took place on July 28-29, 1994, that, at the time of that auction, met the qualifications under the Commission's rules then in effect, for small business status will receive a twenty-five percent bidding credit pursuant to Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239 (released September 10, 1999).

12. Section 95.819 is revised to read as follows:

§ 95.819 License transferability.

(a) A 218-219 MHz Service system license acquired through competitive bidding procedures (including licenses obtained in cases of no mutual exclusivity), together with all of its component CTS licenses, may be transferred, assigned, sold, or given away only in accordance with the provisions and procedures set forth in 47 C.F.R. § 1.2111.

(b) A 218-219 MHz Service system license obtained through random selection procedures, together with all of its component CTS licenses, may be transferred, assigned, sold, or given away, to any other entity in accordance with the provisions and procedures set forth in § 1.948 of this chapter.

(c) If the transfer, assignment, sale, or gift of a license is approved, the new licensee is held to the construction requirements set forth in § 95.833 of this part.

13. Section 95.823 is added to read as follows:

§ 95.823 Geographic partitioning and spectrum disaggregation.

(a) *Eligibility.* Parties seeking Commission approval of geographic partitioning or spectrum disaggregation of 218-219 MHz Service system licenses shall request an authorization for partial assignment of license pursuant to § 1.948 of this chapter.

(b) *Technical standards.*

(1) *Partitioning.* In the case of partitioning, requests for authorization of partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation

of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 seconds along the partitioned service area unless an FCC-recognized service area (*i.e.* Economic Areas) is utilized or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds, to the nearest second of latitude and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where an FCC-recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum maybe disaggregated in any amount.

(3) *Combined partitioning and disaggregation.* The Commission will consider requests for partial assignments of licenses that propose combinations of partitioning and disaggregation.

(c) *Provisions applicable to designated entities.*

(1) *Unjust Enrichment.* See § 1.2111(e) of this chapter.

(2) *Parties Not Qualified For Installment Payment Plans.*

(i) When a winning bidder (partitionor or disaggregator) that elected to pay for its license through an installment payment plan partitions its license or disaggregates spectrum to another party (partitionee or disaggregatee) that would not qualify for an installment payment plan, or elects not to pay for its share of the license through installment payments, the outstanding principal balance owed by the partitionor or disaggregator shall be apportioned according to § 1.2111(e)(3) of this chapter. The partitionor or disaggregator is responsible for accrued and unpaid interest through and including the consummation date.

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire *pro rata* amount of the outstanding principal balance on or before the consummation date. Failure to meet this condition will result in cancellation of the grant of the partial assignment application.

(iii) The partitionor or disaggregator shall be permitted to continue to pay its *pro rata* share of the outstanding balance and, if applicable, shall receive loan documents evidencing the partitioning and disaggregation. The original interest rate, established pursuant to § 1.2110(f)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to the partitionor's or disaggregator's portion of the remaining government obligation.

(iv) A default on the partitionor's or disaggregator's payment obligation will affect only the partitionor's or disaggregator's portion of the market.

(3) *Parties Qualified For Installment Payment Plans.*

(i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation.

(ii) Each party may be required, as a condition to approval of the partial assignment application, to execute loan documents agreeing to pay its *pro rata* portion of the outstanding principal balance due, as apportioned according to § 1.2111(e)(3) of this chapter, based upon the installment payment terms for which it qualifies under the rules. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to § 1.2110(f)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for its portion of the partitioned market.

(iii) A default on an obligation will affect only that portion of the market area held by the defaulting party.

(d) *Construction Requirements.*

(1) *Partitioning.* Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently satisfy the applicable construction requirements set forth in § 95.833 of this part for their respective partitioned areas. If either licensee failed to meet its requirement in § 95.833 of this part, only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the requirement in § 95.833 of this part for the entire market. If the partitionor fails to meet the requirement in § 95.833 of this part, however, only its renewal application would be subject to forfeiture at renewal.

(2) *Disaggregation.* Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the first option, the disaggregator and disaggregatee would certify that they each will share responsibility for meeting the applicable construction requirements set forth in § 95.833 of this part for the geographic service area. If parties choose this option and either party fails to do so, both licenses would be subject to forfeiture at renewal. The second option would allow the parties to agree that either the disaggregator or the disaggregatee would be responsible for meeting the requirement in § 95.833 of this part for the geographic service area. If parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the non-performing party would be subject to forfeiture at renewal.

(3) All applications requesting partial assignments of license for partitioning or disaggregation must include the above-referenced certification as to which of the construction options is selected.

(4) Responsible parties must submit supporting documents showing compliance with the respective construction requirements within the appropriate construction benchmarks set forth in § 95.833 of this part.

14. Section 95.831 is revised to read as follows:

SYSTEM REQUIREMENTS

§ 95.831 Service requirements.

Subject to the initial construction requirements of § 95.833 of this subpart, each 218-219 MHz Service system license must demonstrate that it provides substantial service within the service area. Substantial service is defined as a service that is sound, favorable, and substantially above a level of service which might minimally warrant renewal.

15. Section 95.833 is revised to read as follows:

§ 95.833 Construction requirements.

(a) Each 218-219 MHz Service licensee must make a showing of "substantial service" within ten years of the license grant. A "substantial service" assessment will be made at renewal pursuant to the provisions and procedures contained in § 1.949 of this chapter.

(b) Each 218-219 MHz Service licensee must file a report to be submitted to inform the Commission of the service status of its system. The report must be labeled as an exhibit to the renewal application. At minimum, the report must include:

- (1) A description of its current service in terms of geographic coverage and population served;
- (2) An explanation of its record of expansion, including a timetable of new construction to meet changes in demand for service;
- (3) A description of its investments in its 218-219 MHz Service systems;
- (4) A list, including addresses, of all component CTSs constructed; and
- (5) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and a list of any pending proceedings that relate to any matter described in this paragraph.

(c) Failure to demonstrate that substantial service is being provided in the service area will result in forfeiture of the license, and will result in the licensee's ineligibility to apply for 218-219

MHz Service licenses for three years from the date the Commission takes final action affirming that the 218-219 MHz Service license has been canceled pursuant to § 95.813 of this part.

16. Section 95.853 is revised to read as follows:

§ 95.853 Frequency segments.

There are two frequency segments available for assignment to the 218-219 MHz Service in each service area. Frequency segment A is 218.000-218.500 MHz. Frequency segment B is 218.501-219.000 MHz.

17. Section 95.855 is revised to read as follows:

§ 95.855 Transmitter effective radiated power.

The effective radiated power (ERP) of each CTS and RTU shall be limited to the minimum necessary for successful communications. No CTS or fixed RTU may transmit with an ERP exceeding 20 watts. No mobile RTU may transmit with an ERP exceeding 4 watts.

18. Section 95.859 is revised to modify paragraph (a) and to remove and reserve paragraph (b) to read as follows:

§ 95.859 Antennas.

(a) The overall height from ground to topmost tip of the CTS antenna shall not exceed the height necessary to assure adequate service. Certain CTS antennas must be individually licensed to the 218-219 MHz System licensee (*see* § 95.811(b) of this part) and the antenna structures of which they are a part must be registered with the Commission (*see* part 17 of this chapter).

(b) [Removed and reserved]

(c) * * *

19. Section 95.861 is revised to read as follows:

§ 95.861 Interference.

(a) When a 218-219 MHz Service system suffers harmful interference within its service area or causes harmful interference to another 218-219 MHz Service system, the licensees of both systems must cooperate and resolve the problem by mutually satisfactory arrangements. If the licensees are

unable to do so, the Commission may impose restrictions including, but not limited to, specifying the transmitter power, antenna height or area, duty cycle, or hours of operation for the stations concerned.

(b) The use of any frequency segment (or portion thereof) at a given geographical location may be denied when, in the judgment of the Commission, its use in that location is not in the public interest; the use of a frequency segment (or portion thereof) specified for the 218-219 MHz Service system may be restricted as to specified geographical areas, maximum power, or other operating conditions.

(c) A 218-219 MHz Service licensee must provide a copy of the plan required by § 95.815 (b) of this part to every TV Channel 13 station whose Grade B predicted contour overlaps the licensed service area for the 218-219 MHz Service system. The 218-219 MHz Service licensee must send the plan to the TV Channel 13 licensee(s) within 10 days from the date the 218-219 MHz Service licensee submits the plan to the Commission, and the 218-219 MHz Service licensee must send updates to this plan to the TV Channel 13 licensee(s) within 10 days from the date that such updates are filed with the Commission pursuant to § 95.815 (b) of this part.

(d) Each 218-219 MHz Service system licensee must provide upon request, and install free of charge, an interference reduction device to any household within a TV Channel 13 station Grade B predicted contour that experiences interference due to a component CTS or RTU.

(e) Each 218-219 MHz Service system licensee must investigate and eliminate harmful interference to television broadcasting and reception, from its component CTSs and RTSs, within 30 days of the time it is notified in writing, by either an affected television station, an affected viewer, or the Commission, of an interference complaint. Should the licensee fail to eliminate the interference within the 30-day period, the CTS(s) or RTU(s) causing the problem(s) must discontinue operation.

(f) The boundary of the 218-219 MHz Service system, as defined in its authorization, is the limit of interference protection for that 218-219 MHz Service system.

20. Section 95.863 is removed.

APPENDIX C FINAL REGULATORY FLEXIBILITY ANALYSIS

Report and Order

As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*.² The Commission sought written public comment on the proposals in the *218-219 MHz Flex NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

I. Need for, and Objectives of, the Report and Order:

This rulemaking proceeding was initiated to secure public comment on proposals to maximize the efficient and effective use of spectrum in the 218-219 MHz band, allocated in 1992 to the Interactive Video and Data Service (IVDS) in the Personal Radio Services, now redesignated as the 218-219 MHz Service. In attempting to maximize the use of the 218-219 MHz band, we continue our efforts to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, facilitate technological innovation, and provide opportunities for development of competitive new service offerings. The rules adopted in this *Report and Order* are also designed to implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services in accordance with Section 309(j) of the Communications Act of 1934, as amended (the Communications Act).⁴

II. Summary of Significant Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No petitions were filed in direct response to the IRFA. In general, commenters and reply commenters supported our proposals to provide additional flexibility in the 218-219 MHz Service. Moreover, many of the commenters and reply commenters were existing 218-219 MHz Service

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064, 19101 (1998) (218-219 MHz Flex NPRM).

³ See 5 U.S.C. § 604.

⁴ 47 U.S.C. §§ 257, 309(j).

licensees many of whom, as discussed *infra*, qualify as small businesses. These commenters overwhelmingly supported proposals that would permit (1) acquisitions by partitioning or disaggregation; (2) 218-219 MHz Service licensees and applicants to choose regulatory status; and (3) non-defaulting 218-219 MHz Service licensees currently participating in the installment payment plan to elect one of three restructuring plans concerning their outstanding payments, despite the increased reporting requirements that these proposals may entail.

III. Description and Estimate of the Number of Small Entities to which the Rules Apply:

The Regulatory Flexibility Act directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The Regulatory Flexibility Act generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate for its activities.⁵ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁶ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁷ Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the proposed rules, if adopted.

The rules adopted in this *Report and Order* affect a number of small entities who are either licensees, or who may choose to become applicants for licenses, in the 218-219 MHz Service. Such entities fall into two categories: (1) those using the 218-219 MHz Service for providing interactivity capabilities in conjunction with broadcast services; and (2) those using the 218-219 MHz Service to operate other types of wireless communications services with a wide variety of uses, such as commercial data applications and two-way telemetry services. Theoretically, an entity could fall into both categories. The spectrum uses in the two categories differ markedly.

With respect to the first category, the provision of interactivity capabilities in conjunction with broadcast services could be described as a wireless provider of subscription television service. The SBA's rules applicable to subscription television services define small entities as those with annual gross revenues of \$11 million or less.⁸ In the *Competitive Bidding Tenth Report and Order*, we

⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

⁶ Small Business Act, 15 U.S.C. § 632 (1996).

⁷ 5 U.S.C. § 601(4).

⁸ 13 C.F.R. § 121.201, SIC Code 4841.

extended special competitive bidding provisions to small businesses with annual gross revenues that are not more than \$15 million, and additional benefits to very small businesses with annual gross revenues that are not more than \$3 million.⁹ On January 6, 1998, the SBA approved of the small business size standards established in the *Competitive Bidding Tenth Report and Order*.¹⁰

The Commission's estimate of the number of small business entities operating in the 218-219 MHz band for interactivity capabilities with television viewers begins with the 1992 Bureau of Census report on businesses listed under SIC Code 4841, subscription television services, which is the most recent information available. The total number of entities under this category is 1,788.¹¹ There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services.¹² We know that many of these businesses are cable and television service businesses, rather than businesses operating in the 218-219 MHz band. We also know that, to date, we have issued 612 licenses in the 218-219 MHz Service. Therefore, the number of small entities currently providing interactivity capability to television viewers in the 218-219 MHz Service which will be subject to the rules will be less than 612.

With respect to the second category, neither the Commission nor the SBA has developed a specific definition of small entities applicable to 218-219 MHz band licensees that would provide wireless communications services other than that described above. Generally, the applicable definition of a small entity in this instance appears to be the definition under the SBA rules applicable to establishments primarily engaged in furnishing telegraph and other message communications, SIC Code 4822. This definition provides that a small entity is an entity with annual receipts of \$5 million or

less.¹³ The 1992 Census data, which is the most recent information available, indicates that of the 286

⁹ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19981-85 (1996) (*Competitive Bidding Tenth Report and Order*), *recon. pending*.

¹⁰ See Letter to Daniel B. Phythyon, Chief, WTB, from Aida Alvarez, Administrator, SBA. Dated Jan. 6, 1998.

¹¹ U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC Code 4841 (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

¹² The Census table divides those companies by the amount of annual receipts. There is a dividing point at companies with annual receipts of \$10 million. The next increment is annual receipts of \$17 million, a category that greatly exceeds the SBA definition of small businesses that provide subscription television services. However, there are 17 firms in this category, with revenues between \$10-\$17 million. Approximately 1,480 SIC Code 4841 category firms have annual gross receipts of \$15 million or less. Only a small fraction of those 1,480 firms provide IVDS.

¹³ 13 C.F.R. § 121.201, SIC Code 4822.

firms under this category, 247 had annual receipts of \$4.999 million or less.¹⁴

The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, we defined a small business as an entity, together with its affiliates, that has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.¹⁵ We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the above discussion regarding the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, all of the licenses may be awarded to small businesses, which would be affected by the rule changes we propose.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The final rules adopted in this *Report and Order* alter the reporting and recordkeeping requirements for a number of small business entities. Specifically, (1) 218-219 MHz Service licensees will not be required to file a license renewal application after five years from the date of grant of the license, but will be required to file a license renewal application after ten years after the date of grant of the license; (2) 218-219 MHz Service licensees will not be required to file construction reports at specified intervals after initial licensure, but will be obligated to demonstrate that they are providing "substantial service" as a condition for renewal of their license; and (3) acquisitions by partitioning or disaggregation will be treated as assignments of a license and parties will be required to comply with the 218-219 MHz Service licensing requirements. In addition small business may make elections under the final rules that will alter their reporting and recordkeeping requirements. Specifically, (1) 218-219 MHz Service licensees and applicants may choose to elect regulatory status (common carrier, private, commercial mobile radio service, private mobile radio service) and file appropriate documentation coincident with the regulatory status elected; (2) non-defaulting 218-219 MHz Service licensees currently participating in the installment payment plan may elect one of three restructuring plans concerning their outstanding payments; and (3) 218-219 MHz Service licensees electing to continue making installment payments may be required to execute loan documents as a condition of the reamortization of its installment payment plan under the revised ten-year term.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

¹⁴ 1992 Economic Census Industry and Enterprise Receipts Size Report, U.S. Bureau of the Census, U.S. Department of Commerce, Table 2D, SIC Code 4822 (industry data prepared by the Census Bureau under contract to the U.S. SBA Office of Advocacy).

¹⁵ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330, 2336 (1994).

In response to general comments filed in this proceeding we have adopted final rules designed to maximize opportunities for participation by, and growth of, small businesses in providing wireless services. Specifically, we expect that the extension of license terms from five to ten years and allowing partitioning and disaggregation of licenses, will specifically assist small businesses. We adopted a plan that provided for a reamortization of installment payment debt in conjunction with the extension of license term that differed from our original proposal in specific response to concerns raised in comments and reply comments. Commenters noted that our original proposal would have required licensees to pay two years worth of principal payments, as well as the accrued interest, in a lump sum, within ninety days of the *Report and Order* to retain their licenses, and claimed that such a plan would not allow licensees – in particular, small businesses – sufficient time to make new capital arrangements.¹⁶ Commenters proposed a variety of means of providing relief beyond that which we proposed in the *218-219 MHz Flex NPRM*. We note that some of these proposals – such as a ten-year payout schedule that would be entirely interest-free¹⁷ – may have resulted in greater relief than that provided by the reamortization procedures adopted in the *Report and Order*.

We also believe that our proposals regarding permissible uses of 218-219 MHz Service, liberalization of construction requirements and technical restrictions, and elimination of the cross-ownership restriction, will make expansion of 218-219 MHz Service operations easier, and this flexibility assists all licensees, including small business licensees. We considered proposals by small business interests to eliminate (instead of liberalize) technical restrictions for the service,¹⁸ but concluded that limited technical restrictions are still necessary in order to protect other licensees offering services (such as TV Channel 13 broadcasting) operating in or in close proximity of the 218-219 MHz band. We further believe that by retroactively applying a bidding credit for small businesses to the IVDS auction and by adopting our general auction rules that provide for small business bidding credits, we will maximize opportunities for participation by, and growth of, small businesses in the 218-219 MHz Service. For these reasons, we did not consider any significant alternatives to our proposals to minimize significant economic impact on small entities, nor were any significant alternatives of this nature proposed by commenters and reply commenters.

Report to Congress: The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

¹⁶ See *supra*, para. 42.

¹⁷ See CRSPI Reply Comments at 2.

¹⁸ See, e.g., Petty Comments at 1.